

specific audience data." ACT II, 932 F.2d at 1510; ACT I, 852 F.2d at 1341-42.<sup>11</sup>

Yet, Section 16(a) and the Commission's proposed regulations are not focused on programs or stations that attract substantial numbers of children. Instead, they apply regardless of whether a program or station has any appreciable child audience.<sup>12</sup> The statute and regulation thus are not sufficiently narrowly tailored to shield children, but not adults, from indecent broadcasts.

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<sup>11</sup>The Commission has recently refused to consider such data in an individual indecency proceeding. In re Liability of Sagittarius Broadcasting Corp., DA 92-1444, Mem. Op. at 6-7 (Oct. 23, 1992). The Commission has suggested that evidence that no unsupervised children listen to a particular program "does not eliminate or reduce the reasonable risk that there are a significant number of children . . . who graze the dial with regularity and may be taken by surprise by an indecent message." Id. at 7 (internal quotations omitted). As we have previously explained, the Commission's "grazing" theory is untenable. Available data regarding radio audiences indicate that neither adults nor children engage in significant random tuning. A joint study by Arbitron and the National Association of Broadcasters of 13,000 radio listeners age 12 and over found that this group listened to an average of only 2.99 radio stations per week. See COLRAM-Arbitron Ratings Radio Diary Study: A Cooperative Project of the NAB and Arbitron Ratings (1988). In any event, the possibility that children might be fleetingly exposed to supposedly "indecent" material cannot justify the sweeping 6 a.m.-to-midnight prohibition, given the opportunities for parental supervision that exist during large portions of the broadcast day.

<sup>12</sup>For example, the Commission noted during the earlier proceeding that "according to the Arbitron National Report (Spring 1989), member stations carrying [National Public Radio] programming have no measurable audience in the [12-17] age group from 6 to 10 a.m. and 6 p.m. to 6 a.m." Report of the Commission in MM Docket No. 89-494, 5 F.C.C.R. 5297, 5303 (1990) (emphasis in original). Yet, the adult audience of National Public Radio will be reduced during the safe-harbor period to hearing only "what is fit for children." Sable Communications, 492 U.S. at 128 (quoting Butler v. Michigan, 352 U.S. 310, 383 (1957)).

Finally, the Court of Appeals held in ACT I that the Commission could not justify a scheme of indecency regulation that was predicated on the presence in the audience of 12-to-17-years-olds as opposed to persons under 12. See ACT I, 852 F.2d at 1341-42. Neither Congress nor the Commission has since demonstrated why 12-to-17-year-olds should be considered part of the child audience for purposes of setting an appropriate safe-harbor period. As the Court of Appeals recognized, the Commission has a particularly strong obligation to justify treating teenagers as "children" for purposes of indecency regulation, since the Commission itself previously concluded that indecency regulation should be designed to protect only those under age 12. See ACT I, 852 F.2d at 1342.

## II. SECTION 16(a) AND THE COMMISSION'S PROPOSED REGULATIONS IMPERMISSIBLY DISCRIMINATE AMONG BROADCASTERS

The indecency prohibition mandated by Section 16(a) has an additional constitutional deficiency that was not present in the prohibition invalidated in ACT I: The new prohibition discriminates among categories of broadcasters with respect to the hours during which they may present programming that the Commission may consider indecent. It therefore violates the equal protection component of the Fifth Amendment as well as the First Amendment. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Niemotko v. Maryland, 340 U.S. 268 (1951).

Section 16(a) allows a public broadcasting station to present so-called "indecent" material as early as 10 p.m. -- two hours earlier than all other stations -- provided that the station signs off the air at or before midnight.<sup>13</sup> But no commercial station can present such material between 10 p.m. and midnight regardless of what time it goes off the air. Section 16(a) thus discriminates among stations that sign off the air by midnight based on whether they are public or commercial.<sup>14</sup> It also discriminates between public broadcasting stations that sign off by midnight and those public and commercial stations that do not.

Neither Congress nor the Commission has advanced any regulatory interest that could justify such distinctions among broadcasters. Accordingly, Section 16(a) and the proposed regulations cannot withstand the "careful[] scrutin[y]" that

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<sup>13</sup>The majority of public television stations come within this provision. In 1991, PBS determined that approximately 200 public television stations, or two-thirds of the total stations, signed off the air by midnight on a typical evening. The figure ranged from a high of 241 stations on Monday evening to a low of 190 stations on Saturday evening. According to data compiled by National Public Radio, only about one-quarter of public radio stations (e.g., NPR-member stations and stations supported by the Corporation for Public Broadcasting) sign off the air by midnight. The number ranged from a high of 146 stations on Sunday evening to a low of 108 stations on Saturday evening.

<sup>14</sup>We have not identified data on the precise number of commercial stations that currently sign off by midnight. The number is clearly substantial.

the equal protection guarantee requires of regulations that discriminate among speakers. See Mosley, 408 U.S. at 98-99.

### III. THE COMMISSION'S INDECENCY STANDARD IS UNCONSTITUTIONALLY VAGUE

The parties to the ACT I and ACT II cases, most of whom are also parties to these comments, extensively briefed in the Court of Appeals the issue of the vagueness of the Commission's indecency standard. Those arguments need not be repeated at length here.<sup>15</sup>

As these parties have previously explained, the Commission's standard fails to provide broadcasters with adequate notice of what is and is not "indecent," does not defer to broadcasters' reasonable good-faith judgments as to whether particular material is indecent, and is unconstitutionally vague. Indeed, the Court of Appeals has recognized that "vagueness is inherent" in the Commission's indecency standard. ACT I, 852 F.2d at 1344.

This vagueness is compounded by the Commission's apparent insistence that broadcasters cannot rely on the Commission's own precedents, because no two indecency cases can be considered comparable "unless both the substance of the material they aired and the context in which it was broadcast were substantially similar." In re Liability of Sagittarius Broadcasting Corp., DA 92-1444, Mem. Op. at 4 (Oct. 23, 1992). Accordingly, the Commission's indecency rulings provide

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<sup>15</sup>See Brief of Petitioners at 19-39, ACT I, No. 88-1064 (D.C. Cir. March 25, 1988); Brief of Petitioners at 46, ACT II, No. 88-1916 (D.C. Cir. filed Nov. 5, 1990).

broadcasters with wholly inadequate guidance as to what material might be considered indecent in the future.

The vagueness of the Commission's indecency standard affects all types of programs. However, this vagueness is particularly problematic for news, public affairs and live "talk" programs, which have an element of timeliness that often will be lost if advance legal guidance must be sought as to whether particular word choices would be actionable.

To be sure, the Court of Appeals considered itself foreclosed by Pacifica from ruling that the indecency standard is unconstitutionally vague. Id. However, the court emphasized that the First Amendment would not permit both an inherently vague indecency standard and the absence of "reasonably determined times at which indecent material safely may be aired." Id. at 1342-43. That is precisely what the present legislation has done.

#### IV. THE STAY ON INDECENCY ENFORCEMENT SHOULD BE CONTINUED AND EXTENDED TO ALL PROGRAMS WITH NO APPRECIABLE CHILD AUDIENCE

In the event that the Commission promulgates the proposed regulations, these parties request a stay pending the outcome of appellate review pursuant to Rule 18 of the Federal Rules of Appellate Procedure. We seek a stay that not only prevents indecency enforcement action against programs broadcast between 8 p.m. and 6 a.m., as does the stay entered following ACT I, but also prevents enforcement action against programs

with no appreciable child audience that are broadcast at other times. The broader stay is warranted for two reasons:

First, although more than four years have elapsed since ACT I, the Commission still has not conducted the "full and fair hearing" mandated by the Court of Appeals in that case and in ACT II. This delay was not solely the result of whatever conflict the Commission may have perceived between the Court of Appeals' decisions and Congress's enactment of new indecency prohibitions. For example, the Commission made no move to conduct the proceeding called for by the Court of Appeals during the six months between the Supreme Court's denial of certiorari in ACT II on February 24, 1992, and the President's signing of the Public Telecommunication Act on August 26, 1992. The Commission has thus had ample opportunity to comply with the Court of Appeals' directive that "station- or program-specific audience data" be considered in indecency regulation. ACT II, 932 F.2d at 1510. It is time that the court's directive be honored.

Second, while declining to conduct the mandated "full and fair hearing" on indecency regulation, the Commission has continued to enforce its indecency standard between the hours of 6 a.m. and 8 p.m., and has imposed increasingly severe fines for material broadcast during this period.<sup>16</sup> The Commission is thus imposing sanctions on programming that may not be sanctionable under a constitutional regulatory scheme, either because the broadcast occurred during what is

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<sup>16</sup>See, e.g., Notice of Apparent Liability to Radio Station KLSX(FM) (\$105,000 fine).

ultimately determined to be the appropriate safe-harbor period or because no children were in the audience for the broadcast. The Commission should not be taking enforcement action against such programming without having conducted the proceeding required by the Court of Appeals. We do not suggest that this stay is constitutionally sufficient; however, we believe that it defines the maximum extent of regulation that should be permitted during the period of judicial review.

Accordingly, until the issues raised by the court in ACT I and ACT II are given a "full and fair hearing," no indecency enforcement action should be taken by the Commission against programs that are either (i) broadcast during the 8 p.m.-to-6 a.m. safe-harbor period or (ii) that have no appreciable child audience (i.e., children under 12 constitute no more than 4% of the total audience).

We do not believe that indecency regulation could be justified outside the safe-harbor period where persons under age 12 constitute no more than 10% of the total audience in view of the fact that very few children in the audience would likely be unsupervised. For purposes of an interim stay, however, we are proposing the 4% figure based on the court's reasoning in ACT I. In considering whether there was a "reasonable risk" of young people in the audience for purposes of determining the appropriate safe-harbor period, the court suggested that an indecency prohibition could not be justified by the presence in the audience during a particular time period of only 4% of all young people. 852 F.2d at 1342. Similarly, when children constitute only 4% of the audience

for a particular program, there is no "reasonable risk" that an appreciable number of unsupervised children will be exposed to any arguably indecent material that may be included in that program.<sup>17</sup>

In view of the limited safe harbor now in effect, we request that the Commission act quickly to resolve this proceeding so that the matter can go to the Court of Appeals.

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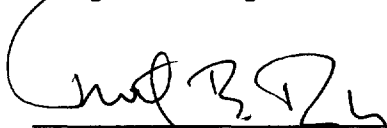
<sup>17</sup>Data for the 2-to-11-year-old audience are available for television but not for radio. If the Commission were to determine during the period of the proposed stay that a radio broadcast was indecent, the station should be permitted to offer evidence to establish that its 2-to-11-year-old audience for the particular time period does not exceed 4% of the total audience.



## CONCLUSION

For the foregoing reasons, the 6 a.m.-to-midnight ban on broadcast indecency violates the First and Fifth Amendments. The Commission should proceed forthwith to conduct the "full and fair hearing" mandated by the Court of Appeals in ACT I and ACT II. No indecency enforcement action should be taken prior to the completion of that proceeding against programs that are broadcast during the 8 p.m.-to-6 a.m. safe harbor or that have no appreciable child audience.

Respectfully submitted,



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